No. 15-674

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

STATE OF TEXAS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 57 national and international labor organizations with a total membership of approximately 12.2 million working men and women.[1] The AFL-CIO has long been concerned with federal immigration law as it affects the many members of its affiliated unions who are immigrants to this nation as well as the rights of immigrant workers more generally. For this reason, the AFL-CIO has filed briefs as *amicus curiae* both in cases involving state efforts to regulate immigration, *see Arizona v. United States*, 132 S. Ct. 2492 (2012), as well as cases involving the interplay of federal immigration and labor law, *see Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

The reason for the AFL-CIO's interest in this particular case is straightforward. The current unauthorized immigrant population in the United States is approximately 11.2 million. Jeffrey S. Passel, Senior

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[1] Counsel for the petitioners and counsel for the intervenor-respondents have each filed blanket consents to the filing of *amicus curiae* briefs in support of either party or of neither party with the Court. Counsel for the respondents has consented to the filing of this *amicus* brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

Demographer, Pew Research Center, *Securing the Border: Defining the Current Population Living in the Shadows and Addressing Future Flows: Hearing Before the Senate Committee on Homeland Security and Governmental Affairs*, 114th Cong. (March 26, 2015) (Written Testimony, pp. 1-2). Of this total, approximately 8.1 million unauthorized immigrants are employed, making up 5.1 percent of the total U.S. labor force. *Id.* at 6. This population is concentrated in several industries in which AFL-CIO-affiliated unions have a strong presence, including meatpacking, leisure and hospitality, construction, domestic services, and agriculture. *Id.* at 7.

In order to adequately represent these employees and their co-workers, AFL-CIO-affiliated unions – and, it should be said, the employers with whom our affiliated unions bargain –require certainty regarding the employment rights of unauthorized immigrant employees. When states are allowed to interfere with the federal government's exclusive role in regulating immigration matters it becomes extremely difficult for unions to undertake their representational duties on behalf of these workers. If the court of appeals' standing decision is sustained, individual states will be able to routinely second-guess federal immigration policies, creating significant uncertainty for unions that represent immigrant workers as well as the employers who employ them. For this reason, the AFL-CIO submits this brief *amicus curiae* explaining why Texas lacks standing to bring its challenge in this case.[2]

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[2] For the reason stated, the AFL-CIO limits its arguments to addressing why Texas lacks standing under Article III of the United States Constitution and standing under the Administra-

SUMMARY OF ARGUMENT

The Court lacks jurisdiction over this case. The court of appeals concluded that Texas had standing to bring this case based on its finding that "Texas subsidizes its [driver's] licenses and would lose a minimum of $130.89 on each one it issued to a DAPA beneficiary." *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015). *See also ibid.* ("licenses issued to [DAPA] beneficiaries would necessarily be at a financial loss"). Any cost to Texas from issuing driver's licenses to individuals who receive deferred action as a result of the Deferred Action Guidance[3] is, however, an insufficiently direct injury to constitute a basis for Article III standing. And, contrary to Texas' claim, states are not entitled to special solicitude in the standing analysis when they seek to challenge decisions concerning federal immigration law.

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tive Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, to bring its challenge in this case. The AFL-CIO agrees fully with the arguments presented by the United States concerning the lawfulness of the Deferred Action Guidance under the APA and the Constitution.

[3] Jeh Charles Johnson, Secretary, Dep't of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014) ("the Deferred Action Guidance" or "Guidance"). One of the policies set forth in the Guidance, a deferred action policy relevant to certain parents of U.S. citizen or legal permanent resident children, is commonly referred to as "DAPA." The court of appeals referred to the Guidance as "DAPA" and to individuals who would receive deferred action as a result of the guidance as "DAPA beneficiaries." *See, e.g., Texas*, 809 F.3d at 147 n.11, 155.

Moreover, the court's conclusion that any "licenses issued to [DAPA] beneficiaries would *necessarily* be at a financial loss" to Texas, *ibid.* (emphasis added) – *i.e.*, that Texas' alleged injury is concrete and actual – is not adequately supported by the sole declaration the state submitted in support of that claim. That declaration does not state that Texas subsidizes the issuance of driver's licenses and notably does not set forth any historical data about the actual cost of issuing driver's licenses to deferred action recipients, even though Texas has issued many driver's licenses to Texas residents who received deferred action as a result of the Secretary of Homeland Security's 2012 Deferred Action for Childhood Arrivals (DACA) guidance. Instead, the declaration provides general estimates about the expected future cost of issuing driver's licenses to individuals who would receive deferred action as a result of the Guidance. Those estimates are insufficiently clear to serve as a basis for standing, exaggerating the number of additional employees needed to process driver's license applications and, as a result of an arithmetic error, doubling the estimated cost of those additional employees.

Finally, even if the cost of issuing driver's licenses to individuals who receive deferred action as a result of the Guidance were a sufficient basis for Article III standing, that injury would not bring Texas within the zone of interests of the Immigration and Nationality Act (INA), 8 U.S.C. § 1001 *et seq.*, as is required to have standing to challenge the Guidance under the APA. Texas' interest in licensing drivers on its roads simply bears no relation to federal immigration law. And, as a matter of law, Texas cannot rely on other alleged injuries, which are clearly insufficient for Article III

standing purposes, to bring its claims within the zone of interests of the INA.

ARGUMENT

1. The court of appeals' conclusion that because "Texas subsidizes its [driver's] licenses," *Texas*, 809 F.3d at 155, it has standing to challenge the Deferred Action Guidance was error because such an injury is not directly related enough to the Guidance to constitute a basis for Article III standing. Contrary to Texas' claim, states are also not entitled to any special solicitude when they seek standing to challenge decisions concerning federal immigration law. And, the court's conclusion that any "licenses issued to [DAPA] beneficiaries would *necessarily* be at a financial loss" to Texas, *ibid.* (emphasis added) – *i.e.*, that Texas' alleged injury is concrete and actual – is not adequately supported by the sole declaration the state submitted in support of that claim.

a. Any cost to Texas from issuing driver's licenses to individuals who receive deferred action as a result of the Guidance is not directly related enough to the Guidance to constitute a basis for Article III standing. Texas' sovereign decision to issue driver's licenses to state residents who receive deferred action is entirely unrelated to the federal government's decision to issue the Guidance. And, the Guidance expresses no view or concern about whether the state issues driver's licenses to individuals who receive deferred action.

This Court has repeatedly admonished that, to have standing, a "plaintiff must show that he 'has sustained or is immediately in danger of sustaining some *direct*

injury' as the result of the challenged official conduct." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)) (emphasis added). This requirement is a key safeguard to "confin[ing] the Judicial Branch to its proper, limited role in the constitutional framework of Government." *Id.* at 581. *See also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."). By allowing Texas to use the incidental cost associated with issuing driver's licenses to individuals who receive deferred action as an entry ticket into federal court, the court of appeals' standing decision improperly draws the Judiciary into evaluating federal immigration policy decisions that lie properly within "the powers of the political branches," *Clapper*, 133 S. Ct. at 1146.

The court of appeals' heavy reliance on *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), as a basis for its standing analysis, *see Texas*, 809 F.3d at 157-58, makes plain the court's error in disregarding the essential requirement that a plaintiff show that "he 'has sustained or is immediately in danger of sustaining some *direct* injury' as the result of the challenged official conduct." *Lujan*, 504 U.S. at 579, 581 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Lyons*, 461 U.S. at 101-02) (emphasis added).

In finding that Wyoming had standing to challenge an Oklahoma law requiring public utilities within the

state to use Oklahoma coal – and thus depriving Wyoming of tax revenue from coal extracted in Wyoming for sale in Oklahoma – this Court explained that the key fact was that the Oklahoma law caused "a *direct* injury in the form of a loss of *specific* tax revenues" to Wyoming. *Wyoming*, 502 U.S. at 448 (emphasis added). The Court contrasted that circumstance with cases "den[ying] standing to States where the claim was that actions taken by United States Government agencies had injured a State's economy and thereby caused a decline in *general* tax revenues." *Ibid.* (citing *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir. 1976), cert. denied, 429 U.S. 977, and *State of Iowa ex rel. Miller v. Block*, 771 F.2d 347 (8th Cir. 1985), cert. denied, 478 U.S. 1012 (1986)) (emphasis added).

The cases relied upon by the Court for the proposition that "actions taken by United States Government agencies . . . [that] injure[] a State's economy and thereby caused a decline in general tax revenues," *ibid.*, are an insufficient basis for standing illustrate why the cost to Texas of issuing driver's licenses to individuals who receive deferred action as a result of the Guidance is an entirely insufficient basis for standing as well.

Kleppe involved a claim by the State of Pennsylvania against the federal Small Business Administration (SBA) seeking to enjoin discontinuance of disaster relief in the wake of a hurricane. 533 F.2d at 670. Pennsylvania argued that it had standing to bring its claim on the basis that termination of federal relief would harm its economy and lead to a reduction in state tax revenues. *Id.* at 671. The court of appeals rejected

that argument, concluding that "that this is the sort of generalized grievance about the conduct of government, so distantly related to the wrong for which relief is sought, as not to be cognizable for purposes of standing." *Id.* at 672.

As the court explained further:

> "[T]he unavoidable economic repercussions of virtually all federal policies, and the nature of the federal union as embodying a division of national and state powers, suggest to us that impairment of state tax revenues should not, in general, be recognized as sufficient injury in fact to support state standing. By analogy to the taxpayer standing cases, it seems appropriate to require some fairly direct link between the state's status as a collector and recipient of revenues and the legislative or administrative action being challenged. This would prevent state standing in cases like the present one, where diminution of tax receipts is largely an incidental result of the challenged action." 533 F.2d at 672.

Similarly, in *Block*, the State of Iowa sued the Secretary of Agriculture seeking an order requiring the Secretary to implement several discretionary agricultural relief programs in response to a severe drought. 771 F.2d at 348. Like Pennsylvania in *Kleppe*, Iowa claimed that it had standing to bring its suit based on the loss of state tax revenues that would result from the drought's impact on agricultural production in the state. *Id.* at 353. As in *Kleppe*, the court of appeals rejected that argument, "conclud[ing] that the State's alleged injury is insufficiently proximate to the actions at issue" to constitute a proper basis for standing. *Id.* at 354.

In this case, the cost to Texas from issuing driver's licenses to individuals who receive deferred action as a result of the Guidance is an expense paid out of the public fisc rather than a diminution of taxes paid into state coffers. But that distinction is of no material significance; increased expenditures and decreased income are two sides of the same coin. The key point is that, as in *Kleppe* and *Block*, the cost of issuing driver's licenses to individuals who receive deferred action as a result of the Guidance is "an incidental result of the challenged action" that is "so distantly related to the wrong for which relief is sought, as not to be cognizable for purposes of standing." *Kleppe*, 533 F.2d at 672.

Unlike *Wyoming* – in which Oklahoma's law requiring the purchase of Oklahoma coal by utilities within the state "involved a *direct* injury [to Wyoming] in the form of a loss of *specific* tax revenues" that Wyoming received from companies that extracted coal within the state for sale in Oklahoma, 502 U.S. at 448 (emphasis added) – the Deferred Action Guidance does not cause any direct injury to Texas.

Texas' sovereign decision to issue driver's licenses to state residents who receive deferred action is unrelated to the Guidance and nothing in the Guidance expresses a view or concern about whether the state issues driver's licenses to individuals who receive deferred action.[4] Texas's policy of issuing dri-

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[4] The REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, permits states, but does not require them, to issue driver's licenses to deferred action recipients. 49 U.S.C. § 30301 note.

ver's licenses to deferred action recipients pre-dates the issuance of the Guidance. *Texas*, 809 F.3d at 155 n.56. That policy may be entirely sensible as a means of ensuring safety on the state's roads, but nothing in the Guidance requires it. Conversely, no individual who receives deferred action as a result of the Guidance is required to seek a driver's license; undoubtedly, some will, but many others will not desire or meet the qualifications to do so. Texas, therefore, can no more challenge the Deferred Action Guidance on the basis of an incidental effect on the cost of issuing driver's licenses than it could challenge the U.S. Department of Veteran's Affairs decision to build a hospital in a suburban location on the basis that lack of public transportation will increase demand for driver's licenses from employees and patients who can only access the facility by car. In either case, the asserted injury to the state is "insufficiently proximate," *Block*, 771 F.2d at 354, to the challenged federal action to provide a basis for standing.

b. Nor does *Massachusetts v. EPA*, 549 U.S. 497 (2007), provide Texas a basis for standing. The court of appeals held that Texas is entitled to "special solicitude" in the standing analysis because it is a state. *Texas*, 809 F.3d at 151 (quoting *Massachusetts*, 549 U.S. at 520). *Massachusetts* does not, however, stand for that sweeping proposition.

Massachusetts involved the state's challenge to an Environmental Protection Agency (EPA) decision not to regulate greenhouse gases under the federal Clean Air Act. *Id.* at 504-05. In concluding that Massachusetts could bring its claim, the Court explained

that it was "of critical importance to the standing inquiry" that "Congress . . . authorized this type of challenge to EPA action," *id.* at 516 (citing 42 U.S.C. § 7607(b)(1)), observing that "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,'" *ibid.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). In particular, the Clean Air Act permits petitions for review challenging EPA actions relating to "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines," *id.* at 506 (quoting 42 U.S.C. § 7521(a)(1)) – precisely what Massachusetts did in its challenge.

Moreover, this Court found that Massachusetts "alleged a particularized injury in its capacity as a landowner" flowing directly from the EPA's failure to regulate greenhouse gases that cause climate change because "rising seas have already begun to swallow Massachusetts' coastal land" and "[b]ecause the Commonwealth owns a substantial portion of the state's coastal property." *Id.* at 522 (quotation marks omitted). It was only on the basis of "th[e] procedural right [set forth in the Clean Air Act] and Massachusetts' stake in protecting its quasi-sovereign interests" of avoiding the physical destruction of state-owned land that this Court determined that "the Commonwealth is entitled to special solicitude in [this Court's] standing analysis." *Id.* at 520.

Texas claims no analogous proprietary interest in

the enforcement of federal immigration law in this case. And, unlike the Clean Air Act, nothing in the INA "authorize[s] th[e] type of challenge to [DHS] action," *Massachusetts*, 549 U.S. at 516, brought by Texas here. To the contrary, "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012). To exercise this power, Congress has assigned the Secretary of Homeland Security exclusive responsibility to "[e]stablish[] national immigration enforcement policies and priorities" and "[c]arry[] out . . . immigration enforcement functions." 6 U.S.C. § 202(3) & (5). *See also* 8 U.S.C. § 1103 ("The Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens."). As this Court has explained, "[i]t is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate states." *Arizona*, 132 S. Ct. at 2498.

Further, in stark contrast to the judicial review provision of the Clean Air Act at issue in *Massachusetts*, Congress has taken affirmative steps to *shield* the Secretary of Homeland Security's "immigration enforcement policies and priorities" and "immigration enforcement functions," 6 U.S.C. § 202(3) & (5), from judicial review. Specifically, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546, Congress added a new provision to the INA titled "Limit on injunctive relief[:]"

> "Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [8 U.S.C. §§ 1221-1231, concerning the removal of aliens], other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated." 8 USC § 1252(f)(1).

As this Court has explained, "[b]y its plain terms, and even by its title, that provision is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231, but specifies that this ban does not extend to individual cases." *Reno v. American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 481-82 (1999).

Congress has, in sum, expressed no "solicitude" whatsoever to plaintiffs – "[r]egardless . . . of the identity of the party or parties bringing the action," 8 USC § 1252(f)(1) – who seek "classwide injunctive relief against the operation" of federal immigration policy, *AADC*, 525 U.S. at 481-82, precisely the type of relief Texas seeks here. And, this Court has made clear that because "immigration policy" is a uniquely "federal power" that "can affect trade, investment, tourism, and diplomatic relations for the entire Nation," *Arizona*, 132 S. Ct. at 2498, states have no special authority to challenge federal immigration decisions. The court of appeals' reliance on *Massachusetts* as a

basis for finding that Texas has standing to challenge the Deferred Action Guidance was, therefore, misplaced.

c. In addition to the legal insufficiency of Texas' argument in favor of standing, the evidence submitted by Texas to the district court, and relied upon by the court of appeals, does not support the court's finding that if the Deferred Action Guidance were to take effect Texas would certainly suffer a financial loss associated with issuing driver's licenses to deferred action recipients.[5]

"[T]he party asserting federal jurisdiction . . . has the burden of establishing it." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006). To assure itself of its own jurisdiction, this Court has not hesitated to scrutinize declarations or affidavits relied upon by lower courts as a basis for standing. *See, e.g., Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330-33 (1999); *Renne v. Geary*, 501 U.S. 312, 316-18 (1991). In this regard, "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution

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[5] Although the United States has not challenged the factual basis on which the courts below found standing, this Court has stated that even where the issue is "raised by neither of the parties, we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III, to seek injunctive relief in the District Court." *Juidice v. Vail*, 430 U.S. 327, 331 (1977). *See generally* Stephen Shapiro et al., *Supreme Court Procedure* 948 (10th ed. 2013) ("When a standing problem is present, the Court will give serious attention to the matter even if not raised by the parties or passed upon by the courts below.").

of the dispute and the exercise of the court's remedial powers." *Renne*, 501 U.S. at 316 (citation and quotation marks omitted).

The court of appeals based its finding that "Texas subsidizes its [driver's] licenses" and that "licenses issued to [DAPA] beneficiaries would necessarily be at a financial loss," on the district court's factual finding to that effect. *See Texas*, 809 F.3d at 155 & n.58 (citing *Texas v. United States*, 86 F. Supp. 3d 591, 617 (S.D. Tex. 2015)). That finding was based on a declaration by Joe Peters, the Assistant Director of the Texas Department of Public Safety (DPS) Driver License Division (the "Peters declaration"), that Texas submitted as an exhibit in support of its Reply in Support of Motion for Preliminary Injunction. 86 F. Supp. 3d at 617 (citing Doc. No. 64, Pl. Ex. 24 in the district court docket). The facts alleged in that declaration are insufficiently clear to "demonstrate[e] that [the state] is a proper party to invoke judicial resolution of this dispute." *Renne*, 501 U.S. at 316.

As an initial matter, the Peters declaration does *not* state that "Texas subsidizes its [driver's] licenses" or that "licenses issued to [DAPA] beneficiaries would necessarily be at a financial loss." *Texas*, 809 F.3d at 155. And, although under current state law, Texas already issues driver's licenses to state residents with deferred action, the state provided no historical data regarding the specific costs it has experienced in this regard. Notably, since 2012, the Secretary of Homeland Security has granted deferred action to certain individuals who were brought to this country as children under the 2012 Deferred Action for Childhood Arrivals (DACA) guidance, *see Texas*, 809 F.3d at 147

(discussing 2012 DACA guidance), including thousands of individuals who reside in Texas, U.S. Citizenship and Immigration Services, *Data Set: Form I-821D Deferred Action for Childhood Arrivals (Through Fiscal Year 2015 4th Qtr)* (Dec. 4, 2015), available at https://www.uscis. gov/tools/reports-studies/immigration-forms-data/data-set-form-i-821d-deferred-action-childhood-arrivals (last checked March 4, 2016). Yet, the Peters declaration conspicuously makes no mention of the 2012 DACA guidance and provides no information regarding the actual costs experienced by Texas to issue driver's licenses to members of this large group of deferred action recipients.

Instead, the Peters declaration relies entirely on general estimates of the additional costs that would be required in the future to issue driver's licenses to individuals who would receive deferred action as a result of the Guidance. These estimates, reviewed carefully, do not clearly demonstrate that licenses issued to individuals who receive deferred action as a result of the Guidance will necessarily create additional costs for Texas.

First, in a chart itemizing the component costs of producing licenses, the declaration shows that the actual "[c]ard [p]roduction [c]ost" for each driver's license is $1.72 per license, Peters Decl. ¶ 8 Table,[6] plus

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[6] We arrive at that figure by dividing the total "Card Production Cost" listed in column 7 by the "Customer Volume Scenario" – *i.e.*, the number of additional customers – listed in column 1. Peters Decl. ¶ 8 Table. The unit cost of $1.72 per license remains constant at all customer volume levels listed in the table.

an additional $.75 fee that Texas pays to the federal government to verify each non-citizen license applicant's lawful presence in the United States, *id.* ¶ 5. Taken together, these direct costs of producing a license are significantly less than the $24.00 fee that Texas charges to each license applicant to obtain or renew a driver's license. TEX. TRANSP. CODE ANN. § 521.421(a).

Texas claims in the declaration, however, that additional employees, office space, and facilities and technology would be needed to meet increased demand for driver's licenses if the Deferred Action Guidance were to go into effect, with the cost of additional employees making up the vast majority of the added expense. *See* Peters Decl. ¶ 8 & Table. Texas' estimates of the additional number of employees required and the expense associated with these employees, however, are greatly exaggerated.

"DPS estimates that for each additional 1,750 driver license customers seeking a limited term license, DPS would have to hire 2.03 full time equivalent (FTE) employees to process those issuances," Peters Decl. ¶ 7, meaning that each full-time employee processes an average of 862 driver's licenses per year or slightly more than three driver's licenses per day. However, DPS's own public reporting shows that in 2013 – the last year for which complete data is available – each full time equivalent employee processed *2,349* driver's licenses per year or *nine* licenses per day. *See* Tex. Dept. of Public Safety, *AY16-17 DPS Resource Book* Appendix p. 2 (Feb. 1, 2015), available at http://www.txdps.state.tx.us/LBB/DPSResource-

Book.pdf (last checked March 4, 2016).[7] This figure is consistent with the publicly-reported data on driver's license processing in other states.[8]

Even if Texas' estimate of the number of driver's licenses issued per employee is correct, the Peters declaration's calculation of the cost of additional employees rests on a basic arithmetic error that almost *doubles* the estimated unit cost of issuing driver's licenses. The declaration calculates the *number* of additional employees that would be needed based on how many driver's licenses each employee can

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[7] For 2013, Texas reported that 2,209 full-time equivalent driver's license employees issued 5,189,231 driver's licenses, including commercial driver's licenses, Tex. Dep't. of Public Safety, *AY16-17 DPS Resource Book* at Appendix p. 2, or 2,349 driver's licenses per employee.

[8] In Tennessee, for example, employees issue an average of about 15 driver's licenses and identification cards per day. Tenn. Dep't. of Safety & Homeland Security, *Safety FY 2012-2013* 19, available at https://www.tn.gov/assets/entities/ safetyattachments/12-13AnnualReport.pdf (last checked March 4, 2016) (stating that "daily average number of customers served per examiner statewide" was 26, and "[d]river licenses and identification license transactions encompassed approximately 58.8 percent of all services provided at driver service centers"). In North Carolina, 422 driver license examiners "complete an average of 10,000 driver license and identification card transactions daily during peak periods and averages 8,500 outside peak periods" for an average of 20 to 24 driver license and identification card transactions per employee per day. N.C. Dep't. of Transportation, Div. of Motor Vehicles, *Driver License Program Continuation Review* 5, 8 (March 2, 2012), available at http://www.ncleg.net/fiscalresearch/continuation_reviews/FY_2011-12_CR_Documents/agency/Driver%20License%20CR%20DOT%202012-03-02.pdf (last checked March 4, 2016).

process in a year, Peters Decl. ¶ 7 ("for each additional 1,750 driver license customers seeking a limited term license, DPS would have to hire 2.03 full time equivalent (FTE) employees to process those issuances"), but calculates the *cost* of each additional employee on a "[b]iennial" basis, *id.* ¶ 8 Table (Column 4, "Biennial Costs for Additional Employees").[9] Obviously, in two years, a single employee can process twice as many licenses as in one year. So, if Texas wishes to calculate employee costs on a biennial basis, it must also calculate the number of employees needed to process licenses on a biennial basis, *i.e.*, half the number of employees would be required to process any given volume of licenses over the course of two years as would be needed to do so in one year. And, because the cost of additional employees makes up the vast majority of the added expense of issuing driver's licenses set forth in the Peters declaration, this miscalculation almost doubles Texas' estimated cost of issuing each driver's license.

In sum, the facts alleged in the sole declaration submitted by Texas as a basis for standing are insuffi-

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[9] For example, at the "Customer Volume Scenario" of 25,000 additional applicants for driver's licenses, the declaration states that 30.9 additional employees would be required, Peters Decl. ¶ 8 Table, a figure that is consistent with the estimate that "for each additional 1,750 driver license customers seeking a limited term license, DPS would have to hire 2.03 full time equivalent (FTE) employees," *id.* ¶ 7. Yet, in calculating the cost of these 30.9 additional employees, the declaration uses the biennial cost of employing each of these employees – approximately $124,000 per employee. *See id.* ¶ 8 Table (calculated by dividing the biennial cost for additional employees in Column 4 by the number of additional employees listed in Column 2).

ciently clear to "demonstrat[e] that [the state] is a proper party to invoke judicial resolution of this dispute." *Renne*, 501 U.S. at 316. Texas has failed to provide historical data describing the actual cost of issuing driver's licenses to the many state residents who have already received deferred action as a result of the 2012 DACA guidance. And, Texas's estimate of the future cost of issuing driver's licenses to individuals who receive deferred action as a result of the Guidance are exaggerated and flawed. The court of appeals' conclusion that "Texas . . . would lose a minimum of $130.89 on each [driver's license] it issued to a DAPA beneficiary," *Texas*, 809 F.3d at 155 – which was entirely based on the Peters declaration – is clearly incorrect.

2. Finally, Texas lacks standing under the APA to challenge the Deferred Action Guidance because the state's alleged injury – the cost of issuing driver's licenses to individuals who receive deferred action as a result of the Guidance – does not fall within the zone of interests protected by federal immigration law.

The APA's judicial review provision states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "To establish standing to sue under the APA," therefore, a plaintiff must "show[] that [he is] adversely affected, *i.e.*, ha[s] suffered an 'injury in fact'" for purposes of Article III, *and* "'must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose viola-

tion forms the legal basis for his complaint.'" *Air Courier Conf. of America v. American Postal Workers Union*, 498 U.S. 517, 523-24 (1991) (quoting *Lujan*, 497 U.S. at 883) (emphasis in original). *See also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (an APA plaintiff "must satisfy not only Article III's standing requirements, but an additional test" of showing he is "within the zone of interests" of the relevant statute) (quotation marks omitted).

It is true, as the court of appeals recognized, that statutory standing under the APA requires that the interest asserted by the plaintiff only be "'arguably within the 'zone of interests' to be protected or regulated by the statute' that he says was violated." *Match-E-Be-Nash-She-Wish Band*, 132 S. Ct. at 2210 (quoting *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)). However, this relatively lenient test must nevertheless be satisfied. The APA's judicial review provision "forecloses suit . . . when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Ibid.* (quoting *Clarke v. Securities Industries Assn.*, 479 U.S. 388, 399 (1987)).

It hardly requires explanation that Texas's interest in issuing driver's licenses to its residents is "so marginally related to . . . the purposes implicit in the [INA] that it cannot reasonably be assumed that Congress intended to permit [such a] suit," *ibid.*, when it enacted that law. As we have already explained, Texas's interest in licensing drivers on its roads bears no re-

lation to federal immigration law. And, even if federal immigration enforcement has some incidental effect on the *costs* borne by Texas to license drivers within the state, those costs are no more proximately related to the Secretary of Homeland Security's immigration policy decisions than was Pennsylvania's loss of state tax revenues to the Small Business Administration's decision to discontinue disaster relief in *Kleppe*, 533 F.2d at 672, or Iowa's decline in tax income to the Secretary of Agriculture's decision not to provide agricultural relief in *Block*, 771 F.2d at 353-54, both of which were found insufficient to sustain even Article III standing.

Not surprisingly, then, in issuing the injunction in this case, the district court did not rely on the cost to Texas of issuing driver's licenses to individuals who receive deferred action as an injury that could bring the state within the zone of interests of the INA for APA standing purposes. Instead, the court relied on very general conclusions that federal immigration laws "were passed in part to protect the States and their residents" and that, therefore, in the court's view, "[t]he fact that DAPA undermines the INA statutes enacted to protect the states puts the Plaintiffs squarely within the zone of interest of the immigration statutes at issue." *Texas*, 86 F. Supp. 3d at 624.

That conclusion was clear error. "[O]n any given claim the injury that supplies constitutional standing must be the same as the injury within the requisite 'zone of interests' for purposes of prudential standing." *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996). *See also* 13A Wright & Miller, *Federal Practice and Procedure* § 3531.7, at

513 ("[T]he same interest must satisfy both tests."). The reason for that rule is straightforward: "A plaintiff may appear who can show Article III injury as to an interest that is not within the zone of interests protected by the underlying . . . statutory principle invoked," or "who . . . can show an interest that is within the protected zone of interests but is not affected in a way that satisfies the Article III tests[,]" *ibid.*:

> "For example, if plaintiffs established an interest sufficiently aligned with the purposes of [a federal statute] for prudential standing, but failed to show (for example) an adequate causal relation between the agency decision attacked and any injury to that interest, we could not adjudicate the claim – even if plaintiffs had constitutional standing with respect to some other interest that was outside the requisite 'zone.'" *Mountain States Legal Found.*, 92 F.3d at 1232.

In this case, even if the district court were correct that "DAPA undermines the INA statutes enacted to protect the states [and thus] puts the Plaintiffs squarely within the zone of interest of the immigration statutes at issue," *Texas*, 86 F. Supp. 3d at 624, Texas clearly would not have Article III standing to pursue that extremely "generalized grievance" of the sort "that the Constitution leaves for resolution through the political process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n. 2 (1998) (citation and quotation marks omitted). Conversely, even if Texas could show that it "had constitutional standing with respect to some other interest that was outside the requisite 'zone [of interest]'" of federal immigration law, *Mountain States Legal Found.*, 92 F.3d at

1232, it could not rely on that distinct injury as a basis for satisfying APA standing.

The court of appeals appears to have recognized the district court's error, explaining that Texas could not "satisf[y] the zone-of-interests test . . . on account of a general grievance" and instead focusing on "the same injury that gives it Article III standing[,]" *Texas*, 809 F.3d at 163, *i.e.*, the cost of issuing driver's licenses to individuals who receive deferred action as a result of the Guidance. The court then held that this injury brought Texas within the zone of interests of the INA on the ground that driver's licenses allegedly constitute a state or local "public benefit[] to illegal aliens" of the sort that "Congress has explicitly allowed states to deny." *Texas*, 809 F.3d at 163 (citing 8 U.S.C. § 1621).

The court of appeals' alternative ground for APA standing, however, fares no better than the district court's analysis. The court of appeals rested its holding on an incorrect assumption that driver's licenses constitute a "state or local public benefit[]"under 8 U.S.C. § 1621. That law defines "state or local public benefit" to include "*professional* licenses" and "*commercial* licenses," as well as a variety of "retirement, welfare, health, disability, . . . housing, . . . education, food assistance, [and] unemployment benefits," 8 U.S.C. § 1621(c)(emphasis added), but not driver's licenses. In any case, an individual who receives deferred action remains ineligible for even those benefits that *do* constitute "state or local public benefits" under 8 U.S.C. § 1621. That is because the only categories of aliens entitled to benefits are nonimmigrants and certain parolees – neither of whom are at

issue in this case – and "qualified aliens." 8 U.S.C. § 1621(a). And, the statute defines the term "qualified alien" to *exclude* deferred action recipients. 8 U.S.C. § 1641(b).

The court of appeals' conclusion that the cost of issuing driver's licenses to individuals who receive deferred action as a result of the Guidance brings Texas within the zone of interests of the INA for APA standing purposes was, therefore, incorrect.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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